

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MARTIN NINO,	)	
	)	
Claimant,	)	
	)	
v.	)	<b>IC 2007-005052</b>
	)	
LAND VIEW FERTILIZER, INC.,	)	
	)	
Employer,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
and	)	<b>AND ORDER</b>
	)	
LIBERTY NORTHWEST	)	
INSURANCE CORPORATION,	)	
	)	
	)	Filed August 12, 2008
Surety,	)	
Defendants.	)	
	)	

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Twin Falls, Idaho on December 6, 2007. James Arnold of Idaho Falls represented Claimant. Kent W. Day of Boise represented Defendants. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on June 10, 2008, and is now ready for decision.

**ISSUES**

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment; and

2. Whether Claimant's condition is due in whole or in part to a pre-existing injury or condition.

By agreement of the parties, additional issues regarding the calculation of benefits are reserved.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he injured his lower back on January 13, 2007 as the result of lifting and loading an 80-pound valve onto a pallet. The injury resulted in a herniated disc at L3-4 with L3 radiculopathy for which surgical intervention has been recommended. Although Claimant has experienced previous back problems, including a lumbar surgery in 1984, Claimant's right-sided radiculopathy is new, and the disc herniation at L3-4 was entirely caused by the industrial accident.

Defendants deny that an industrial accident occurred and contend that Claimant's condition was caused by his longstanding back problems.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Joint Exhibits A through O;
2. Claimant's testimony taken at hearing;
3. The post-hearing deposition of Kerry W. Saurey, M.D., taken on January 23, 2008; and
4. The Industrial Commission legal file pertaining to this claim.

Defendants object to Dr. Saurey's deposition testimony regarding causation on the grounds that it is based, at least in part, on a post-hearing consultation between Claimant and Dr. Saurey on December 24, 2007. Defendants' objection was initially raised on page 16 of Dr.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2**

Saurey's deposition, reiterated on page 18, and articulated in Defendants' post-hearing brief. Defendants seek to exclude this portion of Dr. Saurey's testimony pursuant to J.R.P. Rule 10(E)(4), which prohibits an expert who testifies post-hearing from basing his or her opinion on evidence developed following hearing, absent a showing of good cause and order of the Commission.

Claimant responds that Dr. Saurey's opinion regarding causation is proper and admissible because the crucial causation question posed to Dr. Saurey, beginning on page 17, line 20, requests that he assume facts supplied that are consistent with Claimant's testimony at hearing.

Defendants' objection is understandable in light of the fact that Defendants were not provided with records regarding the consultation of December 24, 2007, and Dr. Saurey had not previously rendered an opinion with regard to causation of Claimant's condition. However, Defendants' objection is overruled; the Commission agrees with Claimant that Dr. Saurey's opinion regarding causation is based on evidence submitted at hearing, or at least consistent with the evidence submitted at hearing.

After having considered all the above evidence and the briefs of the parties, the Commission adopts the following findings of fact and conclusions of law.

## **FINDINGS OF FACT**

### ***Chronology***

1. Claimant was born on May 20, 1955 and was 52 at the time of hearing. He began working for Employer in 1991, primarily as a delivery truck driver. His work with Employer was seasonal and subject to regular periods of lay-off.

2. Claimant was laid off from his usual job duties in December 2006. In early January 2007, his supervisor, James Smith, contacted Claimant about a special two-week work

project in Salem, Oregon. The project involved the tear down and salvage of a closed Microsoft plant. The work was physically demanding and required heavy lifting of tanks, pipes, valves, and pumps. Claimant agreed to work on the project.

3. Claimant traveled to Oregon with a crew and stayed in a hotel during the project. The last day of work was January 13, 2007. On that day, Claimant's job duties included lifting large valves onto a pallet for loading into a truck. The valves weighed approximately 80 pounds each.

4. Late in the afternoon, according to Claimant, he was lifting a valve when he felt a "pull" in his back, followed by pain. Claimant described the pain as seemingly minor, akin to a "pulled muscle or a strain," and he continued to work. He did not inform his supervisor or co-workers that he was experiencing pain. On the following day, Claimant returned to Idaho; he drove home with another crew member. Claimant testified that he felt pain at the time but did not tell his fellow worker about it because he is not the kind of person who complains about his pain.

5. Over the next several days, Claimant's back pain increased. By January 17, 2007, the pain in his back had become quite intense, and Claimant was experiencing pain in his right leg as well. Claimant contacted his primary care physician, Kerry Saurey, M.D., and scheduled an appointment for January 19. Claimant has a history of chronic back pain following lumbar surgery in 1984. Dr. Saurey had served as Claimant's primary care physician for several years.

6. On January 19, 2007, Claimant met with Dr. Saurey. Dr. Saurey's notes from the appointment indicate that Claimant reported pain in his back and right leg, that Claimant's prescribed pain medications, Tylenol #3 and Soma, had not been helping with the pain, and that Claimant had been "worse for three days." Claimant received a Toradol injection and was given

a prescription for Vicodin as well as samples of Durabac. Dr. Saurey's notes for January 19 do not mention anything about Claimant's work or an industrial accident. Dr. Saurey noted that if Claimant's condition did not improve, Claimant would need to obtain additional evaluation, including a lumbar MRI.

7. On January 20, 2007, Claimant's symptoms worsened, and he went to the emergency room. The emergency room report identified Claimant's chief complaint as "back pain, with radiation into the right lower extremity that has become quite painful for the last several days." The report documented the history of Claimant's present illness as follows:

Martin reports that he had back problems necessitating neurosurgery 20 years ago, or so. He has struggled with back pain off and on since then. He has not been much troubled by radiation into either lower extremity until just recently. He does not identify recent injury....His right leg feels weak.

Margo Saunders, M.D., treated Claimant at the emergency room and prescribed him Neurontin for the radicular symptoms.

8. On January 24, 2007, Claimant underwent a lumbar MRI at the referral of Dr. Saurey. The MRI revealed L3-4 right-sided stenosis with indentation of the thecal sac and right neural foraminal stenosis possibly related to an extruded disc. The MRI further revealed degenerative disc disease at L3-4, L4-5, and L5-S1, minor spondylolisthesis at L4-5 with the body of L5 slipped anterior to L4 by a few millimeters, minor spondylosis, and mild facet changes at the lower levels.

9. Claimant returned to Dr. Saurey on January 26, 2007. Dr. Saurey informed Claimant that the MRI findings were abnormal and advised Claimant to see a back specialist. Dr. Saurey's notes from the appointment indicate that Claimant was still in "quite a bit of pain."

10. On January 27, 2007, Claimant reported a work-related injury to James Smith and Curtis Searle. Mr. Smith was Claimant's supervisor at the project in Salem, Oregon. During the

phone conversation between Claimant and Mr. Smith, Claimant informed Mr. Smith that he had injured his back and inquired about filing a workers' compensation claim. Mr. Smith referred Claimant to Mr. Searle.

11. Mr. Searle is a former operations manager for Employer. He left the company on good terms in September 2007 to take another job. Mr. Searle was working as operations manager for Employer in January 2007. Claimant contacted Mr. Searle by phone on January 27, 2007 and reported that he hurt his back while on the job in Oregon. Mr. Searle recalled that Claimant's description of the accident was vague and that Claimant did not detail an exact time or location of the accident. Claimant did mention that he believed the injury occurred while he was lifting valves or pumps.

12. On February 2, 2007, a First Notice of Injury or Illness was prepared for Claimant. The Notice documents that the place of injury was Salem, Oregon, and the day of injury was January 13, 2007. According to the Notice, Claimant was injured when he was loading valves and he "felt like he twisted his back."

13. Tom Groat, Surety's investigator, interviewed Claimant on February 16, 2007 about Claimant's accident and injury. Claimant explained that at about three or four o'clock on the afternoon of January 13, 2007, he felt a "pull" while he was lifting valves. Claimant further explained that he did not report his accident immediately because he thought he had only pulled a muscle. Claimant reported his injury once he realized it was serious.

14. During Mr. Groat's interview with Claimant, Mr. Groat asked Claimant to describe his medical history. Claimant lost two fingers on his left hand in 2000, underwent right shoulder surgery following an injury in the 1990s, and underwent back surgery in 1984. Claimant also had surgery on his right knee in 1997. Mr. Groat asked Claimant if he took any

medication on a regular basis prior to his January 2007 back injury; Claimant replied that he took Tylenol, “over-the-counter stuff,” and “stuff for [his] hand.” Mr. Groat asked if Claimant’s back pain was in the same area as his prior back surgery; Claimant replied, “I don’t know...it’s all in that medical report.” Mr. Groat then asked Claimant if, following the 1984 back surgery, Claimant had follow-up treatment on his back; Claimant replied that he had not and that his back had not bothered him until January 2007.

15. On March 9, 2007, Claimant had an appointment with Dr. Saurey. Dr. Saurey’s notes reveal that Claimant was experiencing sciatic pain and that Claimant was not able to return to work because of the pain. Dr. Saurey also wrote that he provided Claimant with a note to “continue off work” and that Claimant would send the note to the Industrial Commission. The note also said that Claimant needed to consult with a back specialist.

16. Defendants sent a letter to Claimant on March 16, 2007 denying his claim. The denial indicated that medical records documented pre-existing back pain and did not indicate that Claimant injured his back at work. Defendants asserted that they were not able to confirm that a specific accident occurred in the course and scope of Claimant’s employment. Defendants explained that an aggravation of a pre-existing condition is only compensable if the aggravation results from an “accident” as described by statute as an unexpected, undesigned, and unlooked for mishap or untoward event, connected with the industry in which it occurred and which can reasonably be located as to time when and place where it occurred, causing an injury.

17. On April 23, 2007, Claimant visited Dr. Saurey again. Claimant was still experiencing low back and sciatic pain but wished to return to work. Dr. Saurey released Claimant to work on a full-time basis with a 30-pound lifting restriction. Dr. Saurey noted that Claimant had not been able to see a specialist because the “industrial commission [sic]

apparently denied his recent symptoms as being new.” Employer was not able to accommodate Claimant’s restriction and did not offer modified duty work to Claimant. Claimant was terminated by Employer on July 2, 2007, following the expiration of a twelve-week Family Medical Leave Act leave of absence. Claimant attempted to work for an alternate employer but discontinued his employment due to back pain.

18. On June 5, 2007, Claimant and Dr. Saurey spoke by telephone. Claimant told Dr. Saurey that he was not hired back at Employer because of the weight-lifting limitation and that Claimant had tried another job, but it was too painful to work. Claimant told Dr. Saurey that Claimant’s attorney had advised Claimant to inform Dr. Saurey of Claimant’s employment situation. Dr. Saurey noted that Claimant was “trying to get approval through workman’s comp. for further specialty consultation.”

19. Claimant’s daughter works for Mohan Kumar, M.D., in Mountain Home. She was able to arrange a referral by Dr. Kumar to Michael Hajjar, M.D., a neurosurgeon.

20. Dr. Hajjar evaluated Claimant on June 29, 2007. Dr. Hajjar reviewed Claimant’s lumbar MRI of January 24, 2007, and diagnosed a moderately large foraminal disc herniation at L3-4 with L3 nerve root impingement. He opined that the L3 impingement was Claimant’s pain generator and that it was likely an acute problem. Dr. Hajjar stated that Claimant’s disc herniation and L3 radiculopathy was “entirety [sic] the cause of [Claimant’s] symptoms and it entirely relates to the work related injury.” Dr. Hajjar recommended a repeat MRI. Dr. Hajjar noted Claimant’s previous surgeries, including his 1984 back surgery. He did not detail how he arrived at his conclusion that Claimant’s back condition was the result of the work injury.

21. Claimant underwent a repeat lumbar MRI on July 6, 2007, and returned to Dr. Hajjar on July 13, 2007 to discuss the results. Dr. Hajjar reported that the MRI findings were



consistent with the previous MRI findings of January 2007. He recommended an L3-4 right-sided microdiscectomy and decompression of the L3 and L4 nerve roots.

22. On November 8, 2007, Claimant was deposed. During the deposition, Claimant was asked whether or not he had back problems between 1985 and 2007. Claimant denied that he had back problems, but when he was asked specifically whether or not he had ever experienced back pain following his 1984 surgery, he confirmed that he had. Claimant also said that he told Dr. Saurey and the emergency room personnel that he had hurt his back at work.

23. On November 8, 2007, James Smith and Curtis Searle were deposed as well. Mr. Searle said that he had no experience with Claimant that made him believe that Claimant was not truthful or credible. Mr. Smith, Claimant's supervisor, who began to work for Employer in March 2006, said that he had never heard Claimant complain about back pain and praised Claimant as a good worker; he said that Claimant was "willing to do anything you wanted him to do," that he had "never had any problems" with Claimant, and that Claimant "kept the cleanest truck in the fleet." Mr. Smith had observed Claimant working during the January 2007 project in Salem and had not seen that he had any problems.

24. Dr. Saurey confirmed in his post-hearing deposition that he had been Claimant's primary care physician for the past several years. He testified that Claimant saw him on several occasions for exacerbations of back strain or back pain. Claimant was prescribed pain medication and muscle relaxers that he used sparingly and reasonably. Prior to 2007, Claimant had not reported radicular symptoms except once. On November 11, 2004, Claimant reported that he had felt back pain and some weakness in his right leg after lifting at work. Dr. Saurey referred Claimant for diagnostic studies, which showed that Claimant had mild changes at L3-4 and L5-S1. Claimant's condition improved and no surgical intervention was recommended.

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Claimant had new symptoms of right-sided sciatica in January 2007, which prompted a referral for diagnostic studies and to a back specialist. Claimant's condition was worse in January 2007 than it had been in November 2006, when Dr. Saurey had last seen him.

25. At deposition, Dr. Saurey said he was not aware of the incident on January 13, 2007, until he met with Claimant on December 24, 2007. But Dr. Saurey also indicated that he relies on his medical notes to aid his memory. The work accident was not mentioned in Dr. Saurey's notes.

26. Assuming Claimant suffered an industrial accident on January 13, 2007 while working in Oregon, Dr. Saurey concludes, to a reasonable degree of medical probability, that Claimant's condition was causally related to the industrial accident.

***Claimant's Previous Medical Records Regarding Low Back Treatment***

27. Medical chart notes pertaining to Claimant's lumbar spine date back to 2002, by which time Claimant was using Dr. Saurey as his primary care physician. However, diagnostic studies of the lumbar spine date back to August 16, 1995, at which time Claimant underwent a lumbar MRI. The MRI was ordered by Joe Petersen, M.D. There are no corresponding narrative reports or chart notes from Dr. Petersen. The MRI reveals multilevel disc degeneration with multilevel disc bulging. Right nerve root swelling without significant disc herniation at L5-S1 was noted.

28. Dr. Saurey noted Claimant's occasional back pain on January 31, 2002, for which Claimant took Soma compound with Codeine.

29. On June 16, 2003, Claimant reported recurring episodes of lumbar pain across the lumbar area and into the right hip.

30. Claimant experienced recurring back pain in September 2003, after bending over. He was tender at the right S1 joint. Claimant was off of work for this flare-up for approximately one week. No neurological deficits were noted.

31. Left ear pain and a tonsil infection prompted Claimant to seek medical care on February 24, 2004, at which time Claimant reported chronic back pain and requested a refill of Soma. Dr. Saurey noted that Claimant used Soma reasonably and had not “overdone it.”

32. Claimant called Dr. Saurey’s office on May 21, 2004, to request a refill of Tylenol #3, another medication he took for his back. He was prescribed a three month supply.

33. On November 10, 2004, as already noted, Claimant reported back pain and right leg weakness after lifting at work. He underwent diagnostic studies, but no surgical intervention was recommended, and the pain was resolved.

34. During 2005, Claimant did not meet with Dr. Saurey about his back, but he did receive refills on his medication for back pain. On March 11, 2005, Dr. Saurey noted that Claimant used his medication “reasonably and sparingly.”

35. On April 17, 2006, Claimant received additional refills for his back medications. Later that year, on October 31, 2006, Dr. Saurey evaluated Claimant, at which time Dr. Saurey noted that Prevacid and Napropac helped Claimant’s back. Claimant was having abdominal pain and frequent urination. He was advised to stay off of prescription medication pending lab work. Claimant followed up with Dr. Saurey on November 11, 2006 to review lab work results. Claimant was diagnosed with recurring back pain and given a new prescription for Soma.

#### **DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW**

36. A claimant must prove that he or she was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho

747, 918 P.2d 1192 (1996). A claimant is not required to establish a specific time and place of injury. *Hazen v. Gen. Store*, 111 Idaho 972, 729 P.2d 1035 (1986). Rather, an accident need only be reasonably located as to the time when and the place where it occurred. *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (2002). To prevail on a worker's compensation claim, a claimant must establish that an accident happened by a preponderance of the evidence. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008) (citing *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003)). The claimant must prove to a reasonable degree of medical probability that the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. *Id.* (citing *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000)). Probable is defined as "having more evidence for than against." *Id.* (citing *Soto v. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994)).

### ***Credibility***

37. Defendants' primary challenge to Claimant's claim rests on Claimant's credibility. Defendants assert that Claimant is not a credible witness and suggest that his account of the industrial accident is false because he did not tell anyone at the time of the accident that he had hurt himself, because he did not tell medical personnel, including Dr. Saurey and the emergency room staff, about an accident at work, because his accounts of the accident have been inconsistent, and because he was "false" and misleading about his medical history to Surety's investigator and during his November 2007 deposition.

38. Claimant's explanation as to why he waited two weeks to inform Employer of his accident makes sense in light of Claimant's prior experience and conduct. Claimant has suffered from chronic back pain for more than twenty years. He was accustomed to some back pain and did not see a need to report pain every time he felt it; some pain was within the normal realm of

experience for him. James Smith, Claimant's supervisor during most of 2006, testified at deposition that he had never heard Claimant complain about his back prior to the January 2007 incident, though it is evident from Dr. Saurey's notes that Claimant was experiencing back pain throughout the course of 2006. It would not make sense for a sufferer of chronic back pain to complain to those around him every time his back hurt, let alone report it to his employer; it is likely that an employer would fast lose patience with a worker who was always complaining. As soon as Claimant realized he was experiencing more than his usual pain, he consulted with his physician; as soon as he realized that his condition had the potential to be serious, he notified Employer of his accident and injury. Claimant's failure to report his injury as soon as it happened, far from casting doubt on his veracity, was consistent with his prior behavior and was reasonable under the circumstances.

39. The Commission finds Claimant's testimony that he told Dr. Saurey about the industrial accident during his treatment credible. Though Dr. Saurey did not recall Claimant informing him about the accident until December 24, 2007, nearly a year after it had occurred, Dr. Saurey's notes imply that Claimant told Dr. Saurey that he experienced an accident at work much sooner. Dr. Saurey's notes of March 9, 2007, April 23, 2007, and June 5, 2007 all mention either the Industrial Commission or workers' compensation. It is unlikely that Claimant would talk about his workers' compensation case with Dr. Saurey without mentioning that the onset of Claimant's pain occurred at work. At deposition, it was evident that Dr. Saurey has trouble recalling specific information about his patients without his notes, and his notes detailing his consultations with Claimant are brief; they do not detail, verbatim, everything that was said during the consultation. It is more likely that Claimant, who had ample reason to remember his consultations with Dr. Saurey, would have a more accurate and detailed recollection of the

consultations than Dr. Saurey, who has multiple patients and relies on his notes to aid his memory of his dealings with a particular patient.

40. The Commission does not find that the emergency room report of January 20, 2007 is a particularly instructive piece of evidence. The report, apparently prepared by Dr. Saunders, contains a summary of Dr. Saunders's understanding of what Claimant said, not a verbatim transcript of what Claimant said. Defendants suggest that one sentence — "He does not identify recent injury" — supports their implication that Claimant's account of the industrial accident is fabricated. The Commission declines to make such a finding. The report does not include enough information about what precisely Claimant said or in what context Claimant made his statements to lend much credence to a single sentence written by Dr. Saunders. The sentence is Dr. Saunders's conclusory summary and interpretation of what Claimant told her, not Claimant's own words.

41. The Commission finds that, contrary to Defendants' assertions, Claimant has been consistent in his description of the accident. Defendants maintain that because Claimant was not precise and detailed in describing his accident in his initial telephone conversations with Mr. Smith and Mr. Searle, and because his later accounts were more precise and detailed, his account of an industrial accident is likely false. But Claimant has been providing what is essentially the same account all along. In the First Report of Injury or Illness, prepared on February 2, 2007, Claimant's accident and injury are described as follows: "Employee was loading SS valves onto a truck bed when he felt like he twisted his back." The Report identifies January 13, 2007 as the date of injury and Salem, Oregon as the place of injury. On February 16, 2007, Claimant described the accident to Surety's investigator as occurring on January 13, 2007, in Salem, Oregon, while he was loading valves; Claimant said he "felt a pull" and "figured it was a pulled

muscle or some strain.” At hearing, he described a pain in his back that began while he was loading valves; he said he “felt something like a pulled muscle” that “just kind of hurt a little.” Indeed, throughout his workers’ compensation case, Claimant has been quite consistent in his description of when, where, and how the accident occurred.

Mr. Smith and Mr. Searle described their telephone conversations with Claimant as vague and inexact. Claimant recalls that he told them certain details that Mr. Smith and Mr. Searle do not recall. This does not mean that either Claimant or Mr. Smith and Mr. Searle lied about what was said in their conversations. They all related what they remembered of the conversations, and no human memory is exact. It is common for people to remember things differently and common for people to confuse details. It is also natural that a telephone conversation would be less detailed and precise than a formal legal proceeding. That Claimant was more precise and detailed in relating his accident and injury to Surety’s investigator and at deposition and hearing than he was in the telephone conversations does not show or even tend to show that Claimant was fabricating. The degree of precision and detail simply reflects the differing natures of the proceedings, and the essentials of Claimant’s account have not varied throughout the course of the case.

42. Defendants also argue that Claimant has contradicted himself, specifically about when his back pain started, and that his contradictions impede his credibility. For evidence, Defendants point to Mr. Searle’s account of his phone conversation with Claimant and to Dr. Saurey’s notes. The Commission does not find either persuasive evidence that Claimant has contradicted himself to such an extent that his account of the accident is a fabrication. Mr. Searle recalled Claimant telling him that Claimant’s back began to hurt him on January 17, 2007; Claimant recalled telling Mr. Searle that his back began to hurt him on “Saturday,” that is, on

January 13, 2007, the day of the accident. Dr. Saurey's notes from January 19 indicate that Claimant had "been worse for three days." Defendants apparently believe this is evidence that Claimant's back began to hurt him around January 16 or 17, not January 13.

People often do not have precise memories about dates and times — hence the reason why the law requires that an accident need only be reasonably located as to time and place, not specifically located. Claimant has been consistent about the substantial facts of his accident; that he may or may not have been absolutely precise about certain details is more likely a sign of the failings of human memory than a sign of a deliberate and malicious intent to mislead, especially in light of the fact that Claimant was a good, responsible and trustworthy employee who never gave his co-workers reason to doubt his honesty.

43. Defendants' final attack on Claimant's credibility is centered on his descriptions of his prior medical history, specifically with regard to his chronic back pain and the medications he took for it. It is true that Claimant was not a precise historian, especially in his interview with Mr. Groat, Surety's investigator. But the Commission does not find, as Defendants would have it, that Claimant is guilty of telling "blatant falsehoods" about his medical past. It is instructive, on this point, to compare Claimant's interview with Mr. Groat to Claimant's November 2007 deposition. In both the interview and the deposition, Claimant denied having back problems, following his back surgery in 1984, until January 2007. In the deposition, Claimant was asked a follow-up question about whether or not he had experienced back *pain*, and he answered truthfully that he had. Mr. Groat never asked Claimant specifically about back pain. And when Mr. Groat asked Claimant about what medications he took for his back prior to 2007, Claimant's answer makes sense in light of the context of the question. Mr. Groat asked Claimant, "Prior to this incident, were you taking any medication *on a regular basis*?" Claimant replied, "Um, you



know, like Tylenol, over-the-counter-stuff.” In light of Dr. Saurey’s notes that Claimant used Soma and Tylenol #3 “reasonably and *sparingly*,” it is understandable why Claimant answered the way he did: he did not take the prescribed medications frequently or regularly, and therefore not on a regular basis.

44. Defendants have offered no direct, substantive evidence that Claimant’s account of his industrial accident is a lie; they have pointed only to the afore-mentioned alleged inconsistencies and inaccuracies about Claimant’s medical history and use of medication. The Commission does not find that Claimant’s representations as to his medical history constitute purposely inaccurate information. Even if Claimant had falsified his medical history, that alone would not constitute evidence that he also lied about his industrial accident. An allegation that Claimant has lied about his industrial accident requires more evidence than that he merely presented inaccurate information about another matter.

45. This case bears factual similarities to *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008). In *Stevens-McAtee*, the claimant had pre-existing back problems, including degenerative disc disease, but experienced a worsening of his condition while operating a large forklift at work. The Commission determined that the claimant failed to meet his burden of proof to establish that his lumbar disc herniation and radiculopathy were caused by an accident at work, as opposed to a progression of pre-existing mechanical and degenerative changes. The decision was based, in part, on the claimant’s lack of credibility because his “enhanced” testimony at hearing described a specific injury, which was inconsistent with the claimant’s previous vague and general representations regarding his mechanism of injury. The Idaho Supreme Court reversed the decision of the Commission and determined that the claimant sustained a compensable injury. In doing so, the Court made findings that there was

a lack of substantial and competent evidence to support the Commission's determination that the claimant's testimony at hearing lacked credibility. Specifically, the Court observed that, though the claimant's account of the accident became more detailed over time, he was consistent from the beginning that the onset of pain began at work while he was operating a forklift; the Court further noted that the defendants offered no substantial evidence to contradict the claimant's evidence that the onset of his pain occurred during work and that the pain indicated a change in his condition that was consistent with disc herniation.

46. In this case, as in *Stevens-McAtee*, Claimant has provided testimonial evidence that he suffered an onset of pain at work that was caused by an industrial accident. He has also provided medical evidence that his back condition significantly worsened at about the same time. Dr. Saurey has testified that the worsening in Claimant's back condition is consistent with the accident Claimant described. In this case, as in *Stevens-McAtee*, Defendants have not offered substantial evidence to contradict Claimant's evidence. The Commission finds that Claimant is a credible witness.

47. The Commission finds that on the afternoon of January 13, 2007, Claimant suffered an industrial accident when he felt a pull or twist in his back while he was loading a valve onto a pallet.

### ***Causation***

48. Claimant's medical condition is undisputed. The fact that his condition significantly worsened in January 2007 is likewise undisputed. But while Claimant asserts that his industrial accident is the cause of his injury, Defendants maintain that Claimant's injury is simply the result of his longstanding back problems.

49. The fact that Claimant had pre-existing back problems does not defeat his claim. It is well-established in Idaho workers' compensation law that an industrial accident resulting in an injury that aggravates a pre-existing condition becomes an injury in its own right. An employer takes the employee as it finds him. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). Although Claimant cites the *Wynn* case for this proposition in his post-hearing brief, he does not contend that he suffered an aggravation of a pre-existing condition. Rather, it is Claimant's assertion that his injuries were entirely caused by the lifting incident of January 13, 2007.

50. Both Dr. Saurey and Dr. Hajjar attribute Claimant's condition to his workplace accident and injury. Dr. Hajjar's causation opinion is problematic. He concludes that Claimant's disc herniation at L3-4 and L3 radiculopathy are entirely the result of Claimant's work injury. But as Dr. Hajjar was not deposed and did not testify at hearing, it is unclear how he arrived at that conclusion.

51. Dr. Saurey's opinion, however, is persuasive. He has had substantial experience dealing with Claimant's back pain and has observed the changes in Claimant's condition over the years. Dr. Saurey observed that a significant change occurred in Claimant's condition between November 2006 and January 2007. Indeed, there was a significant change in Claimant's condition between early January, when he was able to perform strenuous work, and later January, when he was experiencing severe pain. Dr. Saurey, to a reasonable degree of medical probability, attributes the change in condition to the workplace accident and injury.

52. Defendants have presented no medical evidence or testimony that disputes Dr. Saurey's and Dr. Hajjar's conclusions. Though Dr. Saurey acknowledged, during deposition, that a traumatic event is not necessary for radiculopathy to ensue, he nevertheless concluded that

in Claimant's case, a traumatic event — the industrial accident — was responsible for Claimant's condition.

53. The Commission finds that Claimant has established, by a preponderance of the evidence, that he sustained an accident resulting in an injury while at work on January 13, 2007. The Commission finds that Claimant has established, by a preponderance of the evidence, that his condition was caused by the workplace accident and injury, not by a pre-existing injury or condition or a natural progression of degenerative changes.

### **ORDER**

Based upon the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant sustained an injury on January 13, 2007 from an accident arising out of and in the course of employment.
2. Claimant's condition is not due, in whole or in part, to a pre-existing injury or condition.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this \_\_12th\_\_ day of August, 2008.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
James F. Kile, Chairman

\_\_\_\_\_  
R.D. Maynard, Commissioner

\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 12th\_\_ day of August, 2008, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

JAMES ARNOLD  
P O BOX 1645  
IDAHO FALLS ID 83403-1645

KENT W DAY  
LAW OFFICES OF HARMON, WHITTIER & DAY  
P O BOX 6358  
BOISE ID 83707-6358

eb/cjh

\_\_\_\_\_/s/\_\_\_\_\_